RECEIVED
DEC 28 1979
MICHAEL RODAK, JR., CLERK

No. 79-705

In the Supreme Court of the United States

OCTOBER TERM, 1979

HOUSEHOLD FINANCE CORPORATION, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

WADE H. MCCREE, JR.
Solicitor General

JOHN H. SHENEFIELD
Assistant Attorney General

ROBERT B. NICHOLSON
BRUCE E. FEIN
SEYMOUR H. DUSSMAN
Attorneys
Department of Justice
Washington, D.C. 20530

INDEX

Page

Opinions below 1

Jurisdiction 1

Question presented 2

Statement 2

Argument 5

Conclusion 11

CITATIONS

Cases:

Brown Shoe Co. v. *United States*, 370 U.S. 294 ..... 6, 9

Fortner Enterprises, Inc. v. *United States Steel Corp.*, 394 U.S. 495 9

Houston Oil Co. v. *Goodrich*, 245 U.S. 440 10

ITT v. *GTE*, 518 F. 2d 913 9

Southern Power Co. v. *North Carolina Public Service Co.*, 263 U.S. 508 10

Times Picayune Publishing Co. v. *United States*, 345 U.S. 594 8

United States v. *Alcoa*, 377 U.S. 271 ..... 5, 7-8

United States v. *Connecticut National Bank*, 418 U.S. 656 ..... 3, 5, 6, 9

United States v. *E.I. duPont deNemours & Co.* 351 U.S. 377 7

United States v. *Johnston*, 268 U.S. 220 10

Page

Cases (Continued):

United States v. *Philadelphia National Bank*, 374 U.S. 321 ..... 3, 4, 5

United States v. *Phillipsburg National Bank*, 399 U.S. 350 ..... 3, 4, 5, 9

Statute:

Clayton Act, Section 7, 15 U.S.C. 18 ..... 2, 4

In the Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-705

HOUSEHOLD FINANCE CORPORATION, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1b-19b) is reported at 602 F. 2d 1255. The opinion of the district court (Pet. App. 1a-15a) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on August 10, 1979. A petition for rehearing was denied on September 13, 1979 (Pet. App. 1c). The petition for a writ of certiorari was filed on November 1, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the court of appeals, in a suit challenging a proposed merger of two finance companies, erred in concluding that the evidence showed a distinct product market consisting of direct cash loans by finance companies.

STATEMENT

1. In January 1979, the United States filed a civil antitrust action against petitioners. The complaint alleged that the proposed acquisition of American Investment Company ("AIC") by Household Finance Corporation ("HFC") might substantially lessen competition or tend to create a monoply in the making of direct cash loans by finance companies in numerous sections of the country, in violation of Section 7 of the Clayton Act, 15 U.S.C. 18. Prior to trial, the parties stipulated that "[t]he only issue to be tried in this case is whether the business of making direct cash loans by finance companies is a line of commerce within the meaning of §7 of the Clayton Act" (Pet. App. 2a). They further stipulated that if the district court found such a line of commerce in the United States generally, the acquisition would violate Section 7 and a permanent injunction should be granted (*ibid.*).

After a 13-day trial, the district court dismissed the complaint, concluding that (Pet. App. 4a):

> * * * while it is substantially true that the major business of the consumer finance industry continues to be cash loans to individual customers at high, but regulated, interest rates, and in generally small amounts, aggressive entry into competition with the consumer finance companies by the variety of other financial institutions above described, has created a very substantial overlap of a number of competitors seeking and serving the same consumer market as was once deemed to be the exclusive province of the consumer finance companies. This broad overlap and aggressive competition compels a reassessment of the once-distinct submarket served by the consumer finance companies, a submarket which can no longer be recognized as a distinct or identifiable line of commerce within the meaning of §7 of the Clayton Act.

2. The court of appeals unanimously reversed (Pet. App. 19b). Relying on this Court's decisions describing the characteristics of distinct product markets in financial industries,[1] the court of appeals concluded that if "finance companies provide loans, counseling and other financial services to lower-income, higher-risk customers which other financial institutions do not," cash loans by finance companies would constitute a distinct product market (*id.* at 6b). The court of appeals noted that the district court had found that at one time consumer finance companies served a distinct clientele consisting of lower-income, higher-risk consumers who did not receive service from commerical banks, savings and loan associations, and other lending institutions (*id.* at 3b). The fact that banks and other financial institutions now compete to some extent with finance companies in providing a broad range of other services, the court explained, was not inconsistent with the continued existence of a distinct product submarket

---

[1]See *United States* v. *Connecticut National Bank*, 418 U.S. 656, 664 (1974); *United States* v. *Phillipsburg National Bank*, 399 U.S. 350, 360 (1970); *United States* v. *Philadelphia National Bank*, 374 U.S. 321, 356-357 (1963).

consisting of cash loans by finance companies (Pet. App. 6b-7b). The court of appeals noted that two decisions of this Court[2] have established that banks do not compete directly with finance companies in extending cash loans because the former enjoy large cost advantages in raising capital and charge much lower interest rates (*id.* at 7b-8b). The court of appeals also observed that the trial record established the continuing existence of separate product markets for cash loans from finance companies and banks. The record showed that the average interest rate charged by finance companies (26%) is twice the average rate charged by banks (13%) (*id.* at 8b n.5), and that borrowers are increasingly sensitive to interest rate differentials (*id.* at 4b).

The court of appeals also discussed other evidence confirming that the extension of cash loans by finance companies constitutes a "unique product or service" not available at other financial institutions and is thus properly viewed as an independent product market under Section 7 of the Clayton Act (Pet. App. 8b). It disagreed with the district court's conclusion that only an insignificant number of consumers are served only by finance companies, pointing to extensive evidence (and findings of the district court) that supported the opposite conclusion (*id.* at 10b-16b). Studies of the eligibility of consumers for bank loans, differing charge-off and delinquency rates between banks and finance companies, and statistics on the characteristics of borrowers using both categories of institutions provided "overwhelming evidence" that finance companies alone extend loans to a significant number of high-risk borrowers, constituting

[2] *United States* v. *Philadelphia National Bank*, *supra*; *United States* v. *Phillipsburg National Bank*, *supra*.

between 15 and 50% of finance company customers (Pet. App. 16b-19b). In sum, the court of appeals concluded "that the record below supports the proposition that finance companies offer unique products and services to a class of higher-risk customers than are serviced by other financial institutions" (*id.* at 19b).

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or any other court of appeals. The decision applies settled legal principles to the facts of this particular case. Further review by this Court is not warranted.

1. The court of appeals applied legal principles set forth in decisions of this Court in concluding that the evidence established a product market consisting of cash loans by finance companies. Under the rule prescribed in *United States* v. *Connecticut National Bank*, 418 U.S. 656 (1974), *United States* v. *Phillipsburg National Bank*, 399 U.S. 350 (1970), and *United States* v. *Philadelphia National Bank*, 374 U.S. 321 (1963), such a product market was proven by evidence showing that finance companies provide cash loans and related services to a significant number of lower-income, higher-risk consumers who cannot practically turn to other institutions as alternative lenders. The court of appeals correctly concluded that the requisite showing had been made by undisputed evidence revealing that finance companies, on the average, charge interest rates twice as high as those charged by banks (Pet. App. 8b & n.5),[3] that customers

[3] The importance of comparative interest rates in proving distinct product markets for loans extended by banks and by finance companies was emphasized in *United States* v. *Philadelphia National Bank*, *supra*, 374 U.S. at 356 & n.33. See also *United States* v. *Alcoa*, 377 U.S. 271, 276 (1964). Petitioners' attempt to

are sensitive to interest rate differences (Pet. App. 4b), that a significant portion of finance company borrowers do not qualify for bank loans (*id.* at 16b-17b), that finance companies experience much higher delinquency and charge-off rates than banks (*id.* at 17b-18b), and that average income and occupation levels of finance company borrowers are significantly lower than those of typical bank borrowers (*id.* at 18b-19b).[4]

The court of appeals correctly rejected the district court's contrary conclusions (Pet. App. 2b, 7b & n.3, 8b-10b) because they rested on an erroneous interpretation of the law. The district court mistakenly concluded that cash loans by finance companies could not constitute a separate product market if finance companies competed with various types of financial institutions in providing other financial services; and that finance companies and banks must be viewed as direct competitors in making cash loans if there was some overlap in their respective customer bases. As the court of appeals observed, however, this Court held otherwise in *United States* v. *Connecticut National Bank*, *supra*, 418 U.S. at 660-666 (explaining that the fact that two financial institutions

---

belittle the importance of the very substantial interest rate differential between banks and finance companies (Pet. 11-12 n.2) is contrary to established precedent. It is also contrary to the district court's finding that customers are sensitive to interest rate differences (Pet. App. 7a para. 4). Finally, it is contrary to common sense; it is difficult to understand why a significant number of borrowers, who are sensitive to interest rate differences, would pay, on the average, twice the bank interest rate if bank loans were a feasible alternative for them.

[4]The fact that cash loans by finance companies are extended to a distinct group of lower-income, higher-risk borrowers provides direct support for the delineation of a separate product market. See *Brown Shoe Co.* v. *United States*, 370 U.S. 294, 325 (1962).

vigorously compete in extending credit to some customers does not negate the conclusion that other customers occupy a separate financial market in which no substantial competition between the two institutions exists). Relying on findings of the district court and other record evidence, the court of appeals correctly rejected the district court's conclusion that finance companies do not uniquely serve a significant number of lower-income, higher-risk borrowers (Pet. App. 10b-16b).

2. Petitioners nonetheless argue (Pet. 9) that the court of appeals "held that the absence of 100 percent competitive overlap between two firms precludes a finding that the firms operate in the same line of commerce within the meaning of Section 7." However, the court did not adopt any such analysis. To the contrary, the court of appeals expressly applied the standards prescribed by this Court for determining whether a service offered by a particular type of financial institution occupies a distinct product market—whether the service is provided to a substantial group of customers who cannot obtain the same or equivalent service from other types of financial institutions (Pet. App. 6b). See also *United States* v. *E.I. duPont de Nemours & Co.*, 351 U.S. 377, 395 (1956).

Petitioners also contend (Pet. 10-11) that the court of appeals only considered whether finance companies serve a distinct customer group. However, in addition to finding a separate group of customers, the court also found that the loans offered by one type of financial institution carried much higher interest rates than those applicable to comparable loans made by the other, and that the two were not meaningful competitors with respect to loans granted at widely different rates (Pet. App. 7b-8b). See also *United States* v. *Alco*, 377 U.S.

271, 276 (1964) (emphasizing the significance of pricing differentials in delineating a product market). As the court of appeals explained, the undisputed evidence in this case showed that average interest rates charged by finance companies are 100% higher than average rates charged by banks (Pet. App. 8b n.5).[5] That fact confirms the continuing accuracy of this Court's conclusion that personal loans made by banks are "insulated" from effective competition by finance companies because the interest rates and capital costs of banks are much lower (*id.* at 8b).[6]

3. Petitioners also argue (Pet. 15-18) that even if 50% of finance company customers cannot obtain cash loans at banks or other financial institutions, those customers do not occupy a distinct product market so long as the remaining finance company customers are the beneficiaries of inter-industry competition for cash loans. That proposition is barren of economic or legal support. If an industry faces no meaningful competition within an economically significant market or submarket of

[5]Petitioners erroneously assert (Pet. 11) that the 17-18% interest rate charges on bank credit cards are comparable to interest rates charged by finance companies. Credit card loans are generally for amounts of $200 or less (Tr. 224-225, 279-281, 1409); comparable loans by finance companies generally carry the maximum interest rate permitted by law, which in many states is 36% per annum.

[6]Petitioners also criticize (Pet. 13) the failure of the court of appeals to provide a detailed description of all the attributes of the typical lower-income, higher-risk customer who must turn to finance companies to obtain cash loans. However, the court of appeals identified the general income and occupations of such customers as compared to bank borrowers (Pet. App. 18b-19b). Additional demographic details are not required in delineating a product market. As this Court noted in *Times-Picayune Publishing Co.* v. *United States*, 345 U.S. 594, 611 (1953), a product market "cannot be measured by metes and bounds."

customers, then that market or submarket is subject to scrutiny under the antitrust laws. See *Brown Shoe Co.* v. *United States*, 370 U.S. 294, 325 (1962); *ITT* v. *GTE*, 518 F. 2d 913, 932 (9th Cir. 1975); *United States* v. *Connecticut National Bank*, *supra*, 418 U.S. at 664; *United States* v. *Phillipsburg National Bank*, *supra*, 399 U.S. at 360-361. As the court of appeals noted, the record in this case establishes that 15-50% of the approximately 12.4 million finance customers with cash loans outstanding (loans in excess of $21 billion) could not obtain cash loans elsewhere.[7] This competitively-insulated market for cash loans was sufficiently large to justify recognition as a distinct product market. See *Fortner Enterprises, Inc.* v. *United States Steel Corp.*, 394 U.S. 495, 501-502 (1969).[8]

[7]Gov. Exh. 8, Tables 24, 28.

[8]Contrary to petitioners' assertion (Pet. 19-21), the conclusion that cash loans by finance companies constitute a distinct product market raises no conflict with administrative decisions of the Federal Reserve Board or the views of the Department of Justice. The rulings and opinions cited by petitioners correctly recognize that finance companies and banks compete to some extent across a broad range of the general consumer credit market, especially in the credit card and second mortgage markets. But this fact is not inconsistent with the proposition that cash loans by finance companies constitute an economically significant market or submarket. As this Court explained in *United States* v. *Connecticut National Bank*, *supra*, 418 U.S. at 660-666, simply because different types of financial institutions are aggressive competitors in extending credit to some customers does not foreclose the possibility that other customers occupy a separate market in which no real competition between the institutions exists. See also *United States* v. *Phillipsburg National Bank*, *supra*, 399 U.S. at 359-360 (competition faced by commerical banks from other financial institutions in some aspects of their business does not conflict with the conclusion that there is a separate market for commerical banking).

4. Finally, petitioners argue (Pet. 22) that this Court should grant review of the court of appeals' decision in order to weigh the voluminous evidentiary record.[9] It is axiomatic, however, that certiorari will not be granted "to review evidence" and to draw factual inferences. See, *e.g., United States* v. *Johnston*, 268 U.S. 220, 227 (1925); see also *Southern Power Co.* v. *North Carolina Public Service Co.*, 263 U.S. 508, 509 (1924); *Houston Oil Co.* v. *Goodrich*, 245 U.S. 440, 441 (1918). In any event, petitioners' assertion that the court of appeals drew incorrect inferences regarding market boundaries is wholly unsupported.[10]

---

[9]Petitioners suggest (Pet. 23) that the court of appeals gave de novo scrutiny to the evidence. To the contrary, however, the court of appeals correctly applied the "clearly erroneous" standard of review (Pet. App. 2b).

[10]Contrary to petitioners' contention (Pet. 23-25), the court of appeals properly rejected (Pet. App. 10b-13b) the conclusion that the studies of Boczar and Murphy disproved the existence of customer segmentation in the market for cash loans. Other evidence discussed by petitioners (Pet. 25-28) was correctly viewed by the court of appeals as not inconsistent with the conclusion that cash loans by finance companies constitute an independent product market (Pet. App. 13b-15b). For instance, the fact that some finance company customers may also hold bank credit cards (Pet. 26) is not inconsistent with the fact that an economically significant percentage of finance company borrowers cannot obtain cash loans elsewhere (*id.* at 14b-15b). Petitioners' selective attack (Pet. 28-30) on the "overwhelming evidence" in the record substantiating the existence of significant segmentation of finance company and bank borrowers according to risk (Pet. App. 16b) is merely a quarrel over the weight to be given to individual items of evidence and does not merit review by this Court.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

WADE H. MCCREE, JR.
Solicitor General

JOHN H. SHENEFIELD
Assistant Attorney General

ROBERT B. NICHOLSON
BRUCE E. FEIN
SEYMOUR H. DUSSMAN
Attorneys

DECEMBER 1979

DOJ-1979-12